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Supreme Court of the United States

OCTOBER, 1948 TERM

No. 719

LAWRENCE E. KELLY, ADMINISTRATOR OF THE ESTATE OF H. M. KELLY, DECEASED, AND MOLLIE KELLY,
Petitioners,

v.

THE SHAMROCK OIL AND GAS CORPORATION,
Respondent.

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI

R. C. JOHNSON,
Amarillo Building,
Amarillo, Texas.
W. M. SUTTON,
R. A. WILSON,
P. O. Box 550,
Amarillo, Texas,
Attorneys for Respondent.

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To the Honorable, the Supreme Court of the United States:

Respondent, the Shamrock Oil and Gas Corporation, for reply to the petition for writ of certiorari, respectfully shows:

Respondent is unable to accept petitioners' analysis of the record or of the matters involved in this petition for certiorari, and so as this reply proceeds respondent will substitute its own analysis of the record. As the matter now reaches this court, petitioners' contentions have narrowed to two, both relating to the court's charge to the jury, the one that there was error in the trial court's failure to submit to the jury certain instructions relative

to double agency, and the other that there was error in the trial court's failure to instruct the jury that any fact might be proved by circumstances as well as by direct evidence. With respect to the second contention it must be observed that the trial court did quite plainly instruct the jury in this language:

> "Agency may be established by circumstances, such as the relation of the parties and their conduct with reference to the subject matter involved." (R. p. 283.)

And, since petitioners' entire case hinged upon the alleged agency of one Fowlston for respondent and it was only with respect to this subject of agency that petitioners were fairly entitled to the benefit of an instruction on circumstantial evidence, this complaint is obviously without substance. With respect to both questions it is to be noted that petitioners reserved no exception to any matter actually embraced in the court's charge on the questions now discussed, nor did they by objections point out to the court wherein with respect to these matters they contended that any instruction given was wrong. (R. pp. 286, to 289.) Petitioners thus stand or fall upon their contention that in the refusal of the very instructions requested by them there was material error; and if as applied to this record the requested instructions do not announce correct principles of law or if there be no real reason to believe that a different conclusion of the matter would have been achieved had the requested instructions been given, then the petition lacks substance and should be denied.

In support, therefore, of the judgments below, respondent urges the following points:

RESPONDENT'S FIRST POINT

It is questionable that petitioners made a fact issue entitling them to go to the jury upon the issue of double agency; and, if they did, the jury has resolved that issue against them upon ample evidence and under fair instructions.

RESPONDENT'S SECOND POINT

The trial court would not have been warranted in charging the jury in accordance with petitioners' requests because these authorized a verdict for petitioners without proof of fraud on respondent's part and neither the pleadings nor the evidence warranted a recovery by petitioners save as respondent participated in the fraud charged to it.

RESPONDENT'S THIRD POINT

Save as petitioners established the alleged agency of Fowlston for respondent they were not entitled to recover; and, since the court charged fully on circumstantial evidence as applied to agency, there was no error in the refusal of the additional instruction requested.

Argument under Respondent's First Point

By deed dated June 16, 1941, filed for record June 26, 1941, and recorded in the Moore County Deed Records, Vol. 75, pp. 170, 171, H. M. Kelly and wife, Mollie Kelly, conveyed to respondent all of Survey No. Two hundred thirty eight (238), Block 3-T, T. & N. O. R. R. Company Survey, Moore County, Texas, containing 640 acres of land, more or less. There was reserved to grantors as

royalty the 1/16 part of any oil and casinghead gas produced, this 1/16 interest being further described as being the ½ part of the ⅛ royalty reserved with respect to oil or casinghead gas in the existing or any future lease. (Original Exhibits pp. 87 to 90, R. p. 293.) The price paid was $17,600.00 or $27.50 an acre. The theory of petitioner's suit (R. pp. 6 to 24) was that respondent colluded with petitioners' agent, Fowlston, to acquire the land in question at a grossly inadequate price. The record, however, does not support the contention that the price paid was grossly inadequate. M. G. Mathis, by whom alone petitioners sought to support their view that the surface alone had a reasonable cash market value of from $17.50 to $20.00 an acre and the minerals a value of from $22.50 to $27.50 an acre in June of 1941 (R. pp. 185 to 189), conceded that he made no sales and knew of no sales in the area in question during the year preceding June, 1941, or during the six months following June, 1941. (R. pp. 193, 194.) There was testimony to the contrary that the surface in June of 1941 was worth around $10.00 an acre and the minerals from $15.00 to $20.00 an acre (R. p. 262); it was testified without contradiction that in 1944 W. N. Price purchased the surface at $10.00 per acre and that in previous years he had declined to purchase it at that price (R. p. 269); and by paragraph X of their motion for judgment non obstante veredicto (R. p. 58) petitioners agreed that the court might take the evidence introduced by the respondent with respect to the reasonable cash market value of the surface, namely, $10.00 per acre, as the correct value thereof. Thus for purposes of appeal

petitioners have abandoned their original contention that the sale was at a grossly inadequate price and instead they now contend that, granting that they suffered no actual harm so far as value is concerned, they are still entitled to set aside the transaction because, as they allege, Fowlston acted as the agent of both parties in the transaction and thus there was a concealed double agency entitling petitioners to set aside the transaction without proof of injury.

The record discloses that the deceased Mr. Kelly, a lawyer of long experience (R. pp. 80, 118, 119), had acquired the land in controversy about the year 1918, paying therefor between $5.00 and $8.00 per acre. (R. pp. 120, 121.) When he first purchased the section and for a good many years afterwards it was a grass section only. The section had never been profitable to him, that is, it had never paid him much rent. Had the opportunity ever presented itself to sell the section at an acceptable price he would have done so; but it had not particularly entered his mind that the land could be sold. (R. pp. 122 to 125.) When he sought advice with respect to his Texas lands he went to one C. J. Fowlston, in whom he had confidence. (R. pp. 93, 95.) His first dealings with Fowlston were by correspondence (R. p. 131); and his first personal contact with Mr. Fowlston was when Fowlston visited him in the early part of 1940. (R. pp. 95, 131, 132; Original Exhibits p. 10.) He and his son had utilized Fowlston's services to procure tests by the Railroad Commission of Texas of the gas produced from the well which respondent had drilled on the land in question. (R. pp. 88, 89; Original Exhibits pp. 11 to 16.)

The record further discloses that the particular sale which petitioners now seek to rescind was initiated when Fowlston, acting for Mr. Kelly, approached respondent's president, Mr. Dunn, to determine whether respondent would be interested in the purchase of the gas royalty alone or in the purchase of the interest that was actually purchased. (R. pp. 219 to 221.) Fowlston then corresponded with his principal, Mr. Kelly (R. pp. 165 to 167, 176 to 178); and in May of 1941 Fowlston visited Mr. Kelly in Detroit. (R. pp. 97, 100, 107.) Following this visit, the sale to respondent was actually closed and in such closing Mr. Fowlston continued to act for his principal, Mr. Kelly. (R. pp. 139 to 143, 180.) The sale was in fact closed upon the basis of $17,600.00 and respondent paid that sum to the bank which deposited it to Mr. Kelly's credit. (R. pp. 140 to 142.) Mr. Kelly executed the deed in question before his daughter, Kathryne R. Kelly, who was his own personal secretary, as Notary. (R. p. 143.) Emmett Kelly, the son, bore testimony that he handled the actual closing of the matter, including the mailing to Fowlston of his father's check in the amount of $3,200.00 for commission. (R. pp. 196 to 201.) Fowlston continued to represent Mr. Kelly in subsequent transactions. (R. p. 203.)

Though the record thus discloses that Fowlston represented and was paid a commission of $3,200.00 by Mr. Kelly, it further discloses that on May 9, 1941, respondent issued its check in the amount of $137.61 to Fowlston, covering the expenses of his trip to Detroit in May, and on July 2, 1941, respondent issued its check

to Fowlston in the amount of $500.00, which check supposedly covered his commission. On the issuance of these two checks hinges petitioners' claim of a concealed double agency. The first check, however, lacks the element of concealment because as far back as January of 1941 Fowlston had advised Mr. Kelly by letter that respondent had indicated a willingness to share the expense of any trip he might make to Detroit. (Original Exhibits p. 49.) With respect to the $500.00 check, it was respondent's theory that at no time did it enlist the services of Fowlston to act for it in the transaction, but instead it was led to believe by certain letters written by Mr. Kelly that he required a net deal, that is to say, a deal in which he would be obligated to pay no commission but instead it would be respondent's obligation to pay, in addition to the purchase price, a reasonable commission to Kelly's agent, Fowlston; and that, not being informed by anyone that the complexion of the matter had changed to where Kelly had himself paid a substantial commission out of the purchase price paid him, respondent issued the checks in question in performance of what it considered its obligation to Mr. Kelly, and in no sense was it paying Fowlston for any service rendered for it. Respondent's president, Mr. Dunn, bore testimony that these were the circumstances under which the checks were issued (R. pp. 222 to 224) and that they would not have been issued but for respondent's belief that it was thus obligated to pay Mr. Kelly's commission; further that it was only after this suit was filed that knowledge first came to respondent that instead Mr. Kelly himself had paid a substantial commission. This

positive testimony from Mr. Dunn followed a careful search of respondent's records (R. pp. 225 to 228), based upon which record search Mr. Dunn bore positive testimony that Fowlston had never acted as the agent for respondent in any matter, nor had respondent ever enlisted his services or paid him a commission, but without exception its dealings with Fowlston had been with him as the lease owner or as the representative of land owners selling leases to respondent. (R. pp. 228, 229.) He further testified that on occasion Fowlston had himself sold to respondent leases which he owned and that only in payment for these leases had checks ever been issued by respondent to Fowlston, in which connection respondent tendered its checks for examination by petitioners' counsel. (R. pp. 228, 229.) The record discloses that the foregoing testimony was not controverted. Even so, it might be subject to criticism because of its interested character, were it not for the fact that it finds conclusive support in the record evidence.

On February 21, 1941, Mr. Kelly addressed to Fowlston a letter. (Original Exhibits pp. 55, 56.) This letter does not appear in the printed record but because of its importance it is printed as pages 83 to 85 of respondent's brief as appellee in the Court of Appeals. Petitioners themselves offered in evidence paragraphs 5 and 8 of this letter. (R. p. 176.) The fifth paragraph of the letter reads thus:

> "Now, then, I was not satisfied in the first instance with the offer of $14,400.00, and thought that the Shamrock people should increase this amount. You say they don't wish to do so, and hence I am going to propound another question to you, and that is, *does this*

mean $14,400.00 to me net? Or in other words, will they take care of any fee which you might request, for bringing us together, and would they find the old abstract which I loaned them, and carry it down to date?"

Mr. Kelly wrote a subsequent letter to Mr. Fowlston dated March 14, 1941 (Original Exhibits pp. 61, 62), and because of its importance this letter is likewise printed at pages 86 to 88 of respondent's brief as appellee in the Court of Appeals. Petitioners themselves offered this letter in evidence. (R. p. 177.) It concludes in this language:

"I shall anxiously await the decision of the Shamrock Company, and their letter offering to buy this section under the terms and conditions that I have herein expressed, *and naming their best price net to me.*"

These letters had been actually exhibited to respondent and were its basis for the issuance of the checks in question.

It is the solid foundation thus given respondent's theory by Mr. Kelly's own letters which prompts our question whether petitioners even made a fact issue entitling them to go to the jury upon their theory of double agency. Assuming that such a fact issue was presented, the trial court thus instructed the jury on the subject of agency. Petitioners' theory was presented in this language:

"I give you also the plaintiffs' Requested Instruction Number Nine:

"You are instructed that by agency is meant, a relationship which is based upon a contract, express or implied, of the parties, or created by law, by virtue

of which one party is employed and authorized to act for another. The party so employed is the agent and the one who so employs is the principal. In many instances agency arises not from the use of express language, nor from the existence of a well defined relationship, but from the general conduct of the parties. This relation may exist whether the parties so designate it or not. Agency may be established by circumstances, such as the relation of the parties and their conduct with reference to the subject matter involved.

"You are further instructed that where a party acts in behalf of another under the latter's authority and for the latter's benefit, he is, in law, the agent of the latter." (R. pp. 282, 283.)

Respondent's theory was presented in this language:

"In like manner, I give you certain charges requested by the defendant which are adopted by the court as a part of the law of the case. This is defendant's Requested Charge No. Two.

"You are instructed that C. J. Fowlston is to be regarded as the agent of The Shamrock Oil and Gas Corporation only if the plaintiffs have proven, by a preponderance of the evidence, that Shamrock Oil and Gas Corporation employed Fowlston to act for it as its agent in the very matter in controversy, and unless the plaintiffs have so proven, by a preponderance of the evidence, your verdict will be for the defendant.

"I give you also Requested Instruction No. Seven, on this subject:

"You are instructed that Fowlston could become Shamrock's Agent only if Shamrock employed him to act for it. You are further instructed that there was no impropriety in the issuance of the $500.00 check to Fowlston, if, as it states, it was a commission check that Shamrock's office general manager, J. H. Dunn,

authorized, the same not being for any service performed by Fowlston for it, Shamrock, but upon the good faith assumption, however mistaken, that Kelly's sale had been a sale at a net price, and it was Shamrock's obligation to pay a reasonable commission to Kelly's agent; and in such event, Fowlston, if not previously employed by Shamrock to act, did not become Shamrock's agent merely because of the issuance of the $500.00 check." (R. pp. 7, 8.)

It is now conceded that the principles thus stated by the trial judge in his charge to the jury correctly stated the law of Texas on the subject of agency as presented by this record. The Court of Appeals so holds. (R. pp. 297 to 300, 313, 314.) Petitioners so conceded when in the opening paragraph of their brief filed in the Court of Appeals in support of their petition for rehearing they abandoned their contention that they were entitled to judgment non obstante. Further the prior decisions so hold. Since Fowlston was admittedly Mr. Kelly's agent, the circumstance that Mr. Kelly required his commission to be paid by respondent would not change the relationship so as to make Fowlston respondent's agent rather than the agent of Mr. Kelly. *Stevens, et al. v. Karr, 119 Tex. 479, 33 S. W. (2d) 725; C. F. Hughes v. Dundee Mortgage and Trust Company, 140 U. S. 98, 35 L. Ed. 354, 11 S. Ct. 727; Wittenbrock v. Parker, 102 Cal. 93, 36 P. 374, 41 Am. St. Rep. 172, 24 L. R. A. 197; 2 C. J. S., Sec. 24b(3).*

If, therefore, the transaction had been actually as respondent understood it to be, namely, that Kelly had bargained for a net price and that it was respondent's responsibility to pay in addition the commission due to

Kelly's agent, the payment of the commission by respondent to Fowlston would have been entirely consistent with an intention to deal with Fowlston as the agent of Kelly only, and the circumstance that respondent paid the commission would not have constituted Fowlston respondent's agent but he would have continued to be the agent of Kelly solely. As the record now develops, of course, Kelly paid his own commission, though, peculiarly enough and consistent entirely with the original theory of a net transaction, he paid as commission the full difference between respondent's original figure of $14,400.00 and the final figure of $17,600.00; and there came from Mr. Kelly's own file (R. pp. 135 to 137, defendant's Exhibit 103, Original Exhibits p. 158) an instrument indicative that when Fowlston and Mr. Kelly were together in Detroit there was at least some discussion that Fowlston would receive whatever respondent paid above $14,400.00. The record, though, makes it quite clear that respondent did not know of this but instead respondent knew only that Mr. Kelly had inquired whether respondent would pay the commission and whether the price to be paid by respondent was a price net to him. The Texas courts recognize the principle of apparent authority, that is to say, that when a principal has placed an agent in such situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is led to believe that the agent has authority to perform acts usually done in a business of that kind, one dealing with the agent is justified in presuming such authority to have been given, or, stated otherwise, a principal is equally bound by the authority

which he actually gives and by that which by his own act he appears to give. See *Tex. Jur., Vol. 2, pp. 425, 426, Sec. 39*, and cases cited. The rule is said to be an application to the law of agency of the principles of estoppel which, as far back as the case of *Love v. Barber, 17 Tex. 312, 318*, were thus stated:

> "Likewise the Texas courts recognize the principle that where one of two equally innocent parties must suffer by reason of the fraud of another, the loss should fall upon him whose negligent act or omission has enabled the wrongdoer to commit the fraud." *Morgan v. Harper, Tex. Com. App., opinion approved, 236 S. W. 31, 73; 20 Tex. Jur. pp. 100, 101, sec. 65.*

Here Mr. Kelly by his own letters led respondent to the belief that it was dealing with him on a net basis to where it was its obligation to pay the commission fairly due his agent in addition to the purchase price, and, having by his letters induced Shamrock to accept and act upon that view, petitioners ought not now to be heard to say that a different state of facts actually existed and that a net transaction was not within the contemplation of the parties, or at least respondent ought not be charged with having paid a secret commission or with having given to Kelly's agent, Fowlston, a gratuity in the nature of a bribe as an inducement to Fowlston for entering into contractual relations on behalf of his principal, Kelly.

If there was an issue of fact to go to a jury, the jury was clearly and correctly instructed with respect to what would constitute Fowlston the agent of respondent and with respect to what would not constitute Fowlston the agent of respondent.

Argument under Respondent's Second Point

Petitioners say, though, that there was error in the manner in which the trial court submitted their theory of double agency. Here again we note that petitioners did not by any character of objection direct the attention of the trial judge to any supposed inaccuracy in any matter actually embraced in the court's charge on the subject of agency. (R. pp. 287 to 289.) Therefore the question now presented to the court is necessarily limited to whether there was error in the refusal of such instructions as were requested by petitioners.

Petitioners' contention is that there was error in refusing its Requests Nos. 2 and 10. (R. pp. 42, 49.) Request No. 2 (R. p. 42) instructed the jury to return a verdict for petitioners if the relation of principal and agent existed between Fowlston and respondent from January to June, 1941, without the knowledge of Mr. Kelly. Request No. 10 (R. p. 49) was in substance the same, with the addition that it was not necessary that either Fowlston or respondent intended any fraud or injury to Mr. Kelly but, even though they were innocent in the matter, petitioners would still be entitled to rescission. In contending that these instructions should have been given, petitioners rely upon the rule announced in *Olsen v. Pettibone, Minn. Supp., 210 N. W. 149, 48 A. L. R. 913*, in substance that, where the agent undertakes to act for both parties, the transaction may be rescinded by the one ignorant of the double employment without a showing of injury or intent to deceive. Under this holding petitioners insist that even though

respondent was perfectly innocent in the transaction the deed could still be subject to rescission.

Neither the pleadings nor the evidence, however, render this principle applicable to the present record; and under this record no instruction would have been authorized which would warrant a recovery by petitioners save as it was established that respondent participated in or was a party to the alleged fraud. This suit was not founded on any theory that, though both parties were innocent in the transaction, yet Fowlston had acted for both and therefore the transaction was voidable at the option of whichever of them did not know of the double agency. Instead what petitioners alleged was that prior to December 1, 1940, respondent conceived the fraudulent scheme of inducing the Kellys to part with the title to their land at a grossly inadequate price, that to accomplish this purpose respondent enlisted the services of Kelly's own agent, Fowlston, inducing him to turn against his own principal, that at the behest of respondent Fowlston made to Mr. Kelly a succession of false representations, and respondent, as its part of the scheme, was guilty of other fraudulent conduct, and that it was Mr. Kelly's reliance on what was told him pursuant to this fraudulent combination which brought about the sale and which now entitled petitioners to rescission. (R. pp. 8 to 22.) Without attempting any extended analysis of the evidence, it suffices to say that petitioners attempted to prove what they alleged, that the court extended petitioners wide latitude in the matter of proving all that Fowlston said to Mr. Kelly as inducement, and that by his charge the trial judge authorized the jury to

consider as against respondent what Fowlston said to Kelly, but only in the event the jury first found that petitioners had established the alleged agency of Fowlston for respondent. (R. pp. 281, 282.) Certainly on such a record the Court of Appeals was correct in its holding that only as fraud on respondent's part was proven could there be a recovery (R. p. 299), and therefore on this record there can be no error in the refusal of any instruction which predicates a right of recovery on any theory save the theory of fraud which petitioners have pleaded and attempted to prove. With respect to that theory the charge of the trial judge clearly authorizes a verdict for petitioners if the jury finds the facts to be as petitioners have alleged them to be. (R. pp. 280 to 283.)

Had the pleaded theory of petitioners' case been otherwise, the instructions in question would still have been correctly refused because they ignored the question of ratification. Double agency does not render the contract procured thereby void; the principle affected thereby may ratify the same; at most there results a personal right to rescind which must be exercised within a reasonable time or is lost. This statement finds support in the cases listed on pages *927 and 928 of 48 A. L. R.*, being a part of the annotation following the case of *Olsen v. Pettibone, Minn. Sup., 210 N. W. 149, 48 A. L. R. 913.* In the case of *United States v. Grace Evangelical Church of South Providence Ridge, 7 Cir., 132 F. (2d) 460, 462*, the principle is thus stated:

> "Likewise if either principal, upon learning of the true situation after the transaction has been thus

brought about, ratifies the dual representation the transaction is no longer voidable by him. Section 1532. And unless the principal rescinds within a reasonable time after learning the true situation he is presumed to ratify. Fitzgerald v. Union Central L. Ins. Co., 8 Cir., 42 F. (2d) 76, certiorari denied 282 U. S. 838, 51 S. Ct. 38, 75 L. Ed. 744." [Quotation from *132 F. (2d) 462.*]

It may further be said that the cases uniformly hold that petitioners are entitled to complain of the court's charge only with respect to those matters as to which by specific objection they fairly made known to the trial court the particulars in which they contended the charge to be in error. *Rule 51 of the Federal Rules of Civil Procedure, 28 U. S. C. A. following Section 723c; Palmer v. Hoofman, 318 U. S. 109, 119, 63 S. Ct. 477, 483, 87 L. Ed. 645, 144 A. L. R. 719; Hall v. Aetna Life Ins. Co., 8 Cir., 85 F. (2d) 447, 451; Thiel v. Southern Pacific Company, 9 Cir., 149 F. (2d) 783, Syllabi 17, reversed on other grounds, 328 U. S. 217, 66 S. Ct. 984, 90 L. Ed. 1181, 166 A. L. R. 1412; Home Ins. Co. of New York v. Tydal Company, et al., 5 Cir., 152 F. (2d) 309, rehearing denied 157 F. (2d) 851.*

Further the objections as to the failure to charge are tenable only as to the specific written requests denied. *Home Insurance Company of New York v. Tydal Company, et al., 5 Cir., 152 Fed. (2d) 309, 310.*

Considering the wide latitude allowed petitioners in the development of their case, we submit most respectfully that

petitioners were given full opportunity to develop their case, and that so far as petitioners are concerned there occurred on the trial below nothing inconsistent with substantial justice entitling petitioners to a new trial. *Maryland Casualty Company v. Reed, 5 Cir., 76 F. (2d) 30; Dallas Railway and Terminal Company v. Sullivan, 5 Cir., 108 F. (2d) 581.*

Argument under Respondent's Third Point

Petitioners' final contention finds sufficient answer in the preceding pages of this reply. The complaint is that the trial court erred in refusing petitioners' Request No. 11 (R. p. 38), by which petitioners sought to have the jury instructed that any fact might be proved by circumstance as well as by direct evidence. The fraud which petitioners sought to prove was predicated entirely on their claim of agency, that is to say, that respondent, with knowledge that Fowlston was Mr. Kelly's trusted agent, enlisted him as its own agent to defraud his principal. On this contention the trial court expressly gave the petitioners the benefit of the circumstantial evidence rule in this language:

> "Agency may be established by circumstances, such as the relation of the parties and their conduct with reference to the subject matter involved." (R. p. 283.)

It seems settled that failure to charge, in the precise words requested, a principle clearly stated in the charge given to the jury is not error. *Lemley v. Christophersen, 5 Cir., 150 F. (2d) 291.*

CONCLUSION

Respondent submits most respectfully that on this record judgment was correctly entered in favor of respondent, that petitioners have wholly failed to demonstrate wherein there was error in any ruling of the courts below or wherein any alleged inaccuracy in the charge below has so operated to petitioners' prejudice as to require that the judgments below be set aside and a new trial granted. Respondent therefore submits most respectfully that the petition for certiorari should be denied. It is here certified that before this reply was filed copy thereof was duly served upon petitioners' counsel.

Respectfully submitted,

R. C. Johnson

R. C. JOHNSON,
Amarillo Building,
Amarillo, Texas.

W. M. Sutton

W. M. SUTTON,

R. A. Wilson

R. A. WILSON,
P. O. Box 550,
Amarillo, Texas,
Attorneys for Respondent.